FH

STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

[redacted]

DECISION

MPA/148931

PRELIMINARY RECITALS

Pursuant to a petition filed April 23, 2013, under Wis. Stat. § 49.45(5), and Wis. Admin. Code § HA 3.03(1), to review a decision by the Division of Health Care Access and Accountability (DHCAA) now known as the Office of Inspector General (OIG) in regard to Medical Assistance (MA), a hearing was held on June 06, 2013, at Waukesha, Wisconsin.

The issue for determination is whether the OIG correctly modified petitioner's prior authorization (PA) request for speech and language therapy (SLT).

There appeared at that time and place the following persons:

PARTIES IN INTEREST:
Petitioner:

[redacted]

Respondent:

Department of Health Services
1 West Wilson Street
Madison, Wisconsin 53703

By written submittal of: Theresa Walske, MS, CCC-SLP
Division of Health Care Access and Accountability
1 West Wilson Street, Room 272
P.O. Box 309
Madison, WI 53707-0309

ADMINISTRATIVE LAW JUDGE:
Kelly Cochrane
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner is a resident of Waukesha County. He was 4 years old at the time of the PA request (DOB 6/08) and is diagnosed with Spina Bifida, motor skill delay, and receptive and expressive language delays.

2. Petitioner currently receives SLT in school as evidenced by his Individualized Education Plan (IEP).

3. On February 19, 2013 the petitioner's private SLT submitted a PA request to the OIG (PA# [redacted]). The request was made for 26 sessions (1 time per week for 26 weeks) of SLT beginning March 13, 2013. See Exhibit 1.

4. On April 8, 2013 the OIG issued a notice to petitioner modifying the PA request because it concluded that the SLT regimen requested was not medically necessary at the frequency requested under Wisconsin's MA rules.

DISCUSSION

Speech and language therapy is an MA-covered service, subject to prior authorization after the first 35 treatment days. Wis. Admin. Code, §DHS 107.18(2). In determining whether to approve such a therapy request, the OIG employs the generic prior authorization criteria found at §DHS 107.02(3)(e). Those criteria include the requirements that a service be medically necessary, appropriate, and an effective use of available services.

"Medically necessary" means a medical assistance service under Chapter DHS 107 that is:

> (a) Required to prevent, identify or treat a recipient's illness, injury or disability; and
> (b) Meets the following standards:
>
> 1. Is consistent with the recipient's symptoms or with prevention, diagnosis or treatment of the recipient's illness, injury or disability;
>
> 2. Is provided consistent with standards of acceptable quality of care applicable to the type of service, the type of provider and the setting in which the service is provided;
>
> 3. Is appropriate with regard to generally accepted standards of medical practice;
>
> 4. Is not medically contraindicated with regard to the recipient's diagnoses, the recipient's symptoms or other medically necessary services being provided to the recipient;
>
> 5. Is of proven medical value or usefulness and, consistent with s. DHS 107.035, is not experimental in nature;
>
> 6. Is not duplicative with respect to other services being provided to the recipient;
>
> 7. Is not solely for the convenience of the recipient, the recipient's family or a provider;
>
> 8. With respect to prior authorization of a service and to other prospective coverage determinations made by the department, is cost-effective compared to an alternative medically necessary service which is reasonably accessible to the recipient; and

9. Is the most appropriate supply or level of service that can safely and effectively be provided to the recipient.

Wis. Admin. Code §DHS 101.03(96m).

It is the provider's duty to justify the provision of the services when requesting the PA. The OIG modified the PA here because it found a lack of justification to support continued *private* SLT services under Wis. Adm. Code §§DHS 107.02(3)(b) due to the fact that it found he receives SLT services in the school and the documentation does not support the medical need for the private therapy plan of care.

The OIG found that three of the six goals set forth by the private provider were similar to the school goals, and that these goals were the only goals for which petitioner had demonstrated progress. This relates to goal #1 (using signs and words), #2 (imitate consonant-vowel (CV) combinations), and #3 (imitate simple words). The OIG determined that petitioner's progress with those goals could not be attributable to the private provider because petitioner had been spending more time in the school SLT for those same goals. The OIG also determined that for goals #4 (use of early pronouns me, I, you) and #5 (asking for assistance with personal needs), the private provider had not documented any progress for those goals. For goal #6 (imitating oral motor exercises (OME)), the OIG determined that the current evidence based practice indicated that OMEs, in the absence of sound production, were ineffective.

At the hearing the petitioner's mother and private SLT explained that petitioner had a new IEP which was not available at the time the PA was requested. They also testified to petitioner making significant gains in the last six months regarding his willingness to participate in SLT. The new IEP was dated February 19, 2013 and has three goals listed. The first goal is for petitioner to imitate selected words and short phrases. The second goal is for petitioner to complete language building activities with peers, and the third goal is for petitioner to become familiar with commonly used words and boards by correctly navigating through a Proloquo2go program. See Exhibit 4. The private provider also submitted new plans of care also outlining different goals than those set forth with the PA. The new goals as stated in the plan of care are summarized: 1. Imitate /l/ sound; 2. Imitate /v, f/ sounds; 3. Imitate simple 3-4 word utterances; 4. Use early pronouns (me, I, you); 5. Produce /i/ vowel; 6. Imitate OMEs; and 7. Produce /s/ sound. The new plans of care were from April and June 2013. The new documentation was provided to the OIG post-hearing to allow them an opportunity to respond, as it was evidence not originally provided with the PA.

As to Goal #4: Use early pronouns (me, I, you), the agency reiterated that it did not find SLT warranted because petitioner had been addressing pronouns since 8/12/12 and there has been no documented progress. I must agree that no progress has been documented for this goal. See Wis. Adm. Code § HFS 107.18(3)(e)1.

As to Goal #1, 2, and 7 for articulation of /f, v, s/, and /l/ the agency provided a study regarding the developmental ages for boys to produce those sounds. See "The Iowa Articulation Norms Project and its Nebraska Replication", Journal of Speech and Hearing Disorders, Volume 55, 779-798, November, 1990.
In that study it found that the age of development for males to make the sound /f/ and /v/ was 5 years, 6 months. For the sound /l/, the age of development was 7 years old, and for the sound /s/ the age was 9 years old. Petitioner turned 5 years old in June 2013. As the agency found this study to be an example of a clinical standard of practice, and that the Department of Public Instruction uses that research to identify articulation norms for Wisconsin children, the agency determined that these new goals did not support the need for the private SLT as a *requisite* need to be met under an acceptable standard of practice. Having no evidence to the contrary, I must agree that it appears the requested therapy is outside of the standards for these speech skills. See Wis. Admin. Code §DHS 101.03(96m)(b)3.

For Goal #6 (imitate OMEs) the private provider argues that this goal focuses on the placement of articulators for the later developing sounds of /l, f/. Again, the OIG determined that the current evidence

based practice indicated that OMEs, in the absence of sound production, were ineffective. Further, the Iowa Articulation Norms study shows that /l, f/ are not in line with the age of development for the petitioner at this time. I must agree that the medical necessity of this goal has not been supported by the preponderance of the evidence. See Wis. Admin. Code §DHS 101.03(96m)(b)2, 3, and 5.

For Goal #3 with the private SLT (imitate simple 3-4 word utterances), the school is still also addressing imitation of selected words and short phrases. For Goal #5 (Produce /i/ vowel), the agency found that therapy in addition to school services was still not supported, as the "old" school IEP also focused on petitioner's ability to imitate consonant-vowel combinations throughout the school year. The "old" IEP included the following goal, "Ian will imitate selected sounds in the CV, VC, and CVC shapes in 6/10 opportunities given visual and verbal cues in the school environment." Thus, again, we get back into the duplication issue.

The Department has ruled on when therapy from one provider duplicates that from another. Deputy Secretary Susan Reinardy held in *DHA Final Decision No. MPA-37/80183,* a speech therapy appeal, that "the deciding factor in whether services are duplicative is not the [therapy] technique utilized by the therapists, but the goals and outcomes being addressed by the therapists." *Id.* at 2. It does not matter if one provider addresses group activities with peers and the other one-on-one activities with an adult. A requested service duplicates "an existing service if the intended outcome of the two services is substantially the same." *Id.* at 3. That Final Decision specifically rejected additional therapy because the recipient "'needs' more intense services than the school provides." The holding rests on the principle that "Medicaid may not pay for two services if both services have the same intended outcome or result with respect to the medical condition the services are intended to address." *Id.* at 4. The Deputy Secretary has made it clear that the "intended outcome" test must be read broadly. In *DHA Final Decision No MPA-49/82886,* a decision reiterating the principle laid down in *MPA-37/80183*, she pointed out that the intended outcome was the same if both therapists were working to develop similar functional skills. The unstated rationale underlying the Deputy Secretary's decision, at least as it pertains to private therapy that duplicates school therapy, is that federal law requires school districts to meet the special needs of its students and the Department will not allow a school district's failure to comply with this obligation to provide the reason for funding another source of therapy. The Deputy Secretary's Final Decisions are binding on administrative law judges, meaning that they must follow those decisions.

Based on this, there is not enough to establish the medical necessity of the sought additional private SLT regimen under these Final Decisions. The assertions that group treatment is insufficient versus 1:1 SLT treatment; or that the private regimen is necessary for functional improvement in the home and community versus in the educational setting; are without merit in this analysis. The question is: are these regimens in essence duplicative in addressing the child's condition? I can only conclude that they are. Both the school and the private provider are providing SLT services that are designed to improve his functional expressive communications. I find that the petitioner has not established by clinical documentation the medical necessity of the additional private therapy as that term is used by the MA Program, and the Department's modification must be affirmed.

Nothing in this Decision prevents the petitioner and his private provider from submitting a new PA Request for a new SLT regimen that better documents the medical necessity of the sought private regimen.

CONCLUSIONS OF LAW

The OIG correctly modified petitioner's PA request for SLT.

THEREFORE, it is **ORDERED**

The petition for review herein is dismissed.

REQUEST FOR A REHEARING

This is a final administrative decision. If you think this decision is based on a serious mistake in the facts or the law, you may request a rehearing. You may also ask for a rehearing if you have found new evidence which would change the decision. Your request must explain what mistake the Administrative Law Judge made and why it is important or you must describe your new evidence and tell why you did not have it at your first hearing. If you do not explain these things, your request will have to be denied.

To ask for a rehearing, send a written request to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875. Send a copy of your request to the other people named in this decision as "PARTIES IN INTEREST." Your request for a rehearing must be received no later than 20 days after the date of the decision. Late requests cannot be granted.

The process for asking for a rehearing is in Wis. Stat. § 227.49. A copy of the statutes can be found at your local library or courthouse.

APPEAL TO COURT

You may also appeal this decision to Circuit Court in the county where you live. Appeals must be served and filed with the appropriate court no more than 30 days after the date of this hearing decision (or 30 days after a denial of rehearing, if you ask for one).

For purposes of appeal to circuit court, the Respondent in this matter is the Department of Health Services. After filing the appeal with the appropriate court, it must be served on the Secretary of that Department, either personally or by certified mail. The address of the Department is: 1 West Wilson Street, Madison, Wisconsin 53703. A copy should also be sent to the Division of Hearings and Appeals, 5005 University Avenue, Suite 201, Madison, WI 53705-5400.

The appeal must also be served on the other "PARTIES IN INTEREST" named in this decision. The process for appeals to the Circuit Court is in Wis. Stat. §§ 227.52 and 227.53.

Given under my hand at the City of Milwaukee,
Wisconsin, this 26th day of July, 2013

\sKelly Cochrane
Administrative Law Judge
Division of Hearings and Appeals

State of Wisconsin\DIVISION OF HEARINGS AND APPEALS

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The preceding decision was sent to the following parties on July 26, 2013.

Division of Health Care Access And Accountability